

No. 12306

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United States  
Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

C. E. BONNELL, Doing Business as The Bonnell  
Construction Company, and ROY T. EARLEY,  
Doing Business as The Roy T. Earley Com-  
pany, Joint Adventurers Under the Trade  
Name of Bonnell Construction Company of  
Bremerton,  
Appellees,  
and

C. E. BONNELL, d/b/a The Bonnell Construction  
Company, and ROY T. EARLEY, d/b/a Roy  
T. Earley Company, etc.,  
Appellants,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeals from the United States District Court for the  
Western District of Washington,  
Southern Division

OCT 10 1940



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Court of Appeals  
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Appeals from the United States District Court for the  
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Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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1410 Puget Sound Bank Building,

Tacoma, Washington

Attorneys for Appellees.

United States District Court, Western District  
of Washington, Southern Division

No. 1146

UNITED STATES OF AMERICA, and JOHN D.  
GOODLOE, HENRY T. BODMAN, HARVEY  
J. GUNDERSON, HARLEY HISE and  
HENRY A. MULLIGAN, Directors of the  
Reconstruction Finance Corporation,  
Plaintiffs,

vs.

C. E. BONNELL, d/b/a THE BONNELL CON-  
STRUCTION COMPANY and ROY T.  
EARLEY, d/b/a THE ROY T. EARLEY  
COMPANY, Joint Adventurers under the trade  
name "BONNELL CONSTRUCTION COM-  
PANY OF BREMERTON,"

Defendants.

## COMPLAINT

Come now the plaintiffs, by J. Charles Dennis,  
United States Attorney for the Western District of  
Washington, and Guy A. B. Dovell, Assistant United  
States Attorney for said district, and for cause of  
action against the above named defendants, allege,  
to-wit:

### I.

That the United States of America is a corpora-  
tion sovereign, and that John D. Goodloe, Henry T.  
Bodman, Harvey J. Gunderson, Harley Hise, and



Henry A. Mulligan bring this action in their official capacities as directors of the Reconstruction Finance Corporation, a government chartered corporation, against the above named defendants, pursuant to Sixth Supplemental National Defense Appropriation Act of 1942, Renegotiation Act, Section 403(c) 56, Stat. 245, as amended, to recover from said defendants excessive profits, as the same are more particularly hereinafter set forth.

## II.

That defendant C. E. Bonnell is now and was at all times hereinafter mentioned a resident of Pierce County in the Southern Division of the Western District of Washington, and at such time was an individual doing business under the firm name and style of Bonnell Construction Company.

That defendant Roy T. Earley is now and was at all times hereinafter mentioned a resident of Pierce County, in the Southern Division of the Western District of Washington, and at such time was an individual doing business under the firm name and style of the Roy T. Earley Company.

## III.

That on or about April 24, 1942, the said defendant C. E. Bonnell, d/b/a The Bonnell Construction Company contracted with the War Department of the United States to build a certain number of housing structures at Bremerton, Washington, within a specified time, and thereafter in order to

perform said contract entered into a joint venture agreement with said defendant Roy T. Earley, d/b/a The Roy T. Earley Company, wherein it was agreed that said job would be performed under the trade name of Bonnell Construction Company of Bremerton, and said contracting defendants in the joint venture should share in the performance of said job and equally in the profits before Federal income taxes, and by which agreement said C. E. Bonnell constituted said Roy T. Earley his agent for all purpose of said War Department contract, bearing serial number W-869-Eng.-6202, a copy of which agreement is hereto attached, marked Exhibit "A" and made a part hereof.

#### IV.

That acting in compliance with law and pursuant to duly delegated authority, the RFC Price Adjustment Board duly commenced renegotiation proceedings with the defendants and duly determined, on or about May 17, 1945, that of the profits realized by the defendants on said Contract No. W-869-Eng.-6202, the sum of \$55,000.00 represented excessive profits. And on or about said date, the said RFC Price Adjustment Board, in compliance with law and pursuant to duly delegated authority, acting through its chairman Mr. G. B. Coit, issued a unilateral determination and order, a copy of which is attached hereto, marked Exhibit B, and made a part hereof.

V.

That thereafter, on or about March 17, 1945, the Treasurer of the R.F.C. Price Adjustment Board, by registered mail, served upon said defendants, a letter of demand directed to said defendants to pay to said board said excessive profits of \$55,000.00, less the tax credit, if ay, to which defendants might be entitled under the provisions of Section 3806 of the Internal Revenue Code, a copy of which demand is hereto attached, marked Exhibit C, and made a part hereof.

VI.

That the tax credit to which the defendants are entitled under said section 3806 of the Internal Revenue Code is in the sum of \$35,034.59, computed as aforesaid by the Commissioner of Internal Revenue.

VII.

That the said defendants have refused and still refuse to pay to the plaintiffs the said excessive profits of \$55,000.00 less the aforesaid tax credit, but that the United States has from time to time applied to said obligation the sum of \$7,076.45, out of funds which have at various times come due to the defendants and have been applied either to payment of interest which had therefore accrued or to reduction of the principal obligation, a statement of which is hereto attached, marked Exhibit "D" and made a part hereof. There remains due and owing to the plaintiffs a principal balance of

\$13,341.59, and interest thereon at 6% per annum from September 29, 1945.

Wherefore, plaintiffs pray for judgment against the defendants C. E. Bonnell and Roy T. Earley in the sum of \$13,341.59 plus interest thereon at the rate of 6% per annum from September 29, 1945, together with plaintiffs' costs herein, and for such other and further relief as to the court may seem just and proper.

/s/ J. CHARLES DENNIS,  
United States Attorney

/s/ GUY A. B. DOVELL,  
Assistant United States  
Attorney.

EXHIBIT A  
(Copy)

Agreement of Joint Adventure

This Agreement made this ..... day of May, 1942, between C. E. Bonnell, doing business as Bonnell Construction Company, hereinafter referred to as "Bonnell," party of the first part, and Roy T. Earley, doing business as Roy T. Earley Company, hereinafter referred to as "Earley," party of the second part, Witnesseth:

The parties hereto are building contractors who have, for a long period of time, engaged in building construction in the Pacific Northwest and have organizations and equipment adapted to and suitable for the carrying out of construction projects.

Heretofore, Bonnell was awarded a contract by the United States, acting by and through the United States Engineers Corps, for the construction of approximately three hundred structures for the use of the 202nd Coast Artillery Corps, Anti-Aircraft, in the vicinity of Bremerton, Washington, which contract is known as contract No. . . . . and dated upon the ..... day of ....., 1942, and which is made a part hereof by reference.

By the terms of said contract Bonnell is required to furnish to the United States a performance bond in the amount thereof. Bonnell has the experience and employee personnel and a substantial portion of the equipment necessary for the successful completion of said contract. He is, however, without sufficient funds to provide a performance bond or to pay for materials and labor necessary to be purchased or employed previous to the time that moneys are received under the contract from the United States.

Earley is able and willing to finance the performance of said contract and to furnish any and all accounting services in connection therewith for a percentage of the net profits, if any, from such contract, as hereinafter set forth.

In view of the foregoing facts and circumstances, it is Agreed that the parties hereto, as joint adventurers in this particular transaction, and in no other respect, will undertake the full performance of said contract upon the following terms and conditions:

1. Bonnell will manage and direct all construction operations in connection with the performance of said contract; not including, however, the operation of the accounting department thereof, and will hire and discharge, if necessary, any and all laborers, foreman or other persons reasonably required to aid and assist in the carrying out of such contract. For the services to be performed by Bonnell in connection with this venture he shall receive the sum of Four Hundred Dollars (\$400.00) per month, beginning upon the ..... day of May, 1942, which shall be considered one of the labor costs of the undertaking and be charged up against the gross sums received before the division of net profits, as hereinafter set forth.

2. The parties hereto agree to sign an application for a performance bond and Earley will furnish the necessary indemnity or guaranty in order to secure the issuance of such a bond; the cost thereof, if any, sustained by Earley to likewise be charged as a proper cost in connection with the job. Bonnell will sign said bond without the joinder of Earley thereto.

3. Earley agrees to furnish all funds or credit which may be required to enable the contract to be performed. It is Agreed, however, that in this connection Earley shall furnish such necessary clerical help or accountants as may be reasonably required in connection with the performance of this contract and that all receipts and disbursements made shall be made under the supervision and control of such



person as may be designated by Earley. The reasonable and necessary salaries and wages of such clerical or accounting help so furnished by Earley shall be charged to the job and against gross receipts before the division of profits.

4. In the event that, previous to the full performance of said contract Bonnell shall die or become disabled so as to be unable to fully and completely manage and supervise said contract, then Earley may, at his option, take over the full management and control of the completion of the contract and that, in such event, he may designate or appoint either himself or some other person who shall perform the duties theretofore carried on by Bonnell and shall be paid therefor, as a cost to be charged against the job, the sum of Four Hundred Dollars (\$400.00) per month.

5. It is contemplated that Earley will furnish all office equipment stationery and other supplies in connection with the clerical and accounting department and that Bonnell will furnish certain machinery, tools and equipment necessary to be used in the performance of the contract. It is Agreed that a reasonable rental shall be charged by the parties against the job for the use of the personal property hereinbefore described and that each of them shall recover such reasonable rental from the gross receipts before division of profits.

6. In the event that it shall be found necessary to purchase any machinery, tools, equipment or

office supplies and equipment in order to complete said contract, then the same shall be deemed to be owned jointly by the parties and upon the completion of the job shall either be divided in a manner mutually agreed upon between the parties or else sold and the proceeds equally divided between the parties.

7. It is Agreed that said job will be performed under the trade-name of "Bonnell Construction Company of Bremerton" and that all funds advanced by Earley or any other person, firm or corporation in connection with said job and all moneys received from the Government in connection therewith, shall be placed in a special fund which shall be separate and apart from other funds of the parties hereto and shall not be subject to withdrawal or check except upon the signature or signatures of such person or persons as may be mutually agreed upon between the parties.

8. It is Agreed that after all labor, taxes, rentals, materials and other items of expense, including the salary of Bonnell, as aforesaid, and including also the salaries of persons designated by Earley and employed in the accounting department, have been paid in full, then the difference, if any, between the gross amounts received from the United States under said contract and said costs shall be disbursed as follows:

(a) There shall be paid therefrom to Earley from said funds an amount equal to all advances made by him in the course of the performance of the contract and, in addition thereto, an amount



equal to all interest paid by him upon funds borrowed by him and used in the performance of the venture.

(b) There shall be paid to each of the parties reasonable rental for the use of machinery and equipment, as provided in paragraph five hereof.

(c) Any sums remaining after said payments shall then be divided equally between the parties; that is to say, each of the parties shall receive fifty per cent (50%) of the net profits, before income taxes, which may accrue after the payments of the items aforesaid.

Executed in duplicate, the day and year first above written.

.....  
.....

Doing business as Bonnell  
Construction Company,  
First Party,

.....

Doing business as Roy T.  
Earley Company, Second  
Party.

EXHIBIT B  
(Copy)

RFC Price Adjustment Board  
Determination of Excessive Profits

Whereas, C. E. Bonnell (doing business as Bonnell Construction Company), of Tacoma, Washing-

ton, has heretofore entered into a certain contract (hereinafter referred to as "said contract") with the United States of America (acting through the Secretary of War and the Corps of Engineers) numbered W869-ENG-6202, which is subject to renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943, and as affected by Title VII of the Revenue Act of 1943 so far as applicable (such Section 403 as so amended and affected being herein called "Section 403"); and

Whereas Roy T. Earley (doing business as Roy T. Earley Company), of Tacoma, Washington, has entered into an agreement of joint adventure with said C. E. Bonnell for the performance of said Contract, whereby said C. E. Bonnell and said Roy T. Earley became and were joint adventurers for the full performance of said Contract and for the sharing, upon the terms recited in such agreement of joint adventure, of the profits to be realized under said Contract; and

Whereas, There has been delegated by the Secretary of War by appropriate authority (under subsection (f) of Section 403) to the RFC Price Adjustment Board (herein sometimes called the "Board") and its duly authorized representative or representatives all of the power, authority and discretion necessary to the conduct of the renegotiation of, and the elimination of excessive profits realized under, said Contract; and

Whereas, Renegotiation has taken place between the Board on the one part and, on the other part, said C. E. Bonnell and said Roy T. Earley, joint adventurers for the performance of said Contract (and as such joint adventurers sometimes hereinafter referred to as "Contractor"), pursuant to the provisions of Section 403 and pursuant to such delegation, for the purpose of eliminating excessive profits realized by Contractor during its fiscal year ended December 31, 1942, under said Contract; and

Whereas, as a basis for said renegotiation the Board has considered certain financial, operating and other data, submitted by Contractor or obtained by the Board from governmental or other reliable sources, relating to the profits realized by Contractor during said fiscal year under said Contract; and

Whereas, Contract has been granted the opportunity to submit such information and to present such contentions as Contractor deemed material in determining the excessiveness of said profits and the renegotiability of said Contract, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented:

Now Therefore, Pursuant to the power, authority and discretion vested in the Secretary of War under the provisions of Section 403, as heretofore dele-

gated to the Board, it is hereby found and determined by the RFC Price Adjustment Board;

1. That \$55,000 of the profits realized by Contractor during its fiscal year ended December 31, 1942, under said Contract are excessive.

2. That in connection with the payment or discharge by any means of the amount of excessive profits hereby found and determined to have been realized by Contractor, Contractor shall be credited with the aggregate of the amounts, if any, to which said C. E. Bonnell and said Roy T. Earley may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

Accordingly, it is hereby ordered and directed that the excessive profits so found and determined, less the aggregate of any such tax credits, shall be eliminated by any one or more of the methods provided for in Section 403; and that the appropriate representatives of the Board shall take any and all action which may be necessary or desirable to effect such elimination.

RFC PRICE ADJUSTMENT  
BOARD,

By: (Signed) G. B. COIT,  
Vice Chairman.

Mar 17 1945

EXHIBIT C

(Copy)

RFC Price Adjustment Board

811 Vermont Avenue, N.W.

Washington 25, D. C.

Mar 17, 1945

Roy T. Earley and C. E. Bonnell  
Trading as Bonnell Construction Company of  
Bremerton  
760 $\frac{1}{2}$  Commerce Street  
Tacoma, Washington

Gentlemen:

Enclosed is a signed copy, of even date herewith, of a Determination and Order entered in proceedings for the renegotiation of profits realized under Contract No. W869-ENG-6202 during your fiscal year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as last amended July 14, 1943, and as affected by Title VII of the Revenue Act of 1943.

You will observe, from an examination of such document, that this Board has determined that \$55,000 of profits realized by you during the fiscal year under review were excessive, and that under its terms you are ordered and directed to repay excessive profits in that amount less the aggregate of the amounts of the tax credits, if any, to which you may be entitled pursuant to Section 3806 of the Internal Revenue Code.

Demand is accordingly hereby made upon you for

payment of the amount due under the terms of the Order. Payment should be made in the form of a check or draft made payable to the order of "RFC Price Adjustment Board," and mailed to the Board, for the attention of the undersigned, 811 Vermont Avenue, Northwest, Washington 25, D.C. Interest at the rate of 6% per annum on the net amount due will become payable from and after a date fifteen days from the date of this letter of demand.

You should furnish us either with the originals or with certified copies of the communications from the Internal Revenue Agent in Charge, supporting the amount of the tax credits for which allowance is claimed in calculating the net amount due under the Order.

Very truly yours,  
/s/ FACIUS W. DAVIS,

Enclosure

Treasurer.

Return Receipt  
(Copy)

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. ROY T. EARLEY

(Signature of name of addressee)

C. E. BERNA (illegible)

2. C. E. BERNA (illegible)

(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery: March 22, 1945.



## EXHIBIT D

### BONNELL CONSTRUCTION COMPANY

#### Recoveries:

Department	Effective Date	Amount	Application	
			Interest	Principal
War .....	7/ 4/45	\$3,064.34	\$232.02	\$2,831.32
War .....	8/ 9/45	3,134.86	101.40	3,033.46
War .....	9/29/45	877.25	118.21	759.04

#### Interest Computations:

Balance		Accrual	Recovery	Interest Balance
\$19,965.41	4/24/45 to 7/ 4/45	\$ 233.02	\$233.02	—0—
17,134.09	7/ 4/45 to 8/ 9/45	101.40	101.40	—0—
14,100.63	8/ 9/45 to 9/29/45	118.21	118.21	—0—
13,341.59	9/29/45 to 8/ 1/47	1,471.60	—0—	\$1,471.60

Interest from 8/1/47 on \$13,341.59 amounts to \$2.1931 per day.

Received RFC Price Adjustment Board Aug. 22, 1947. Office of the Secretary.

[Endorsed] : Filed June 29, 1948.

[Title of District Court and Cause.]

### MOTION TO STRIKE

Comes now C. E. Bonnell, d/b/a The Bonnell Construction Company, one of the defendants herein, and moves to strike the complaint herein for the reason and upon the ground that there is sought to be set out in said complaint separate alleged causes of action against the defendants founded upon a separate transaction and occurrence which are not stated in separate counts as required by Sub-division (b) Rule 10 of the Rules of Practice prescribed for the District Courts of the United States.

In the alternative, and in the event that the foregoing Motion be denied and without waiving said Motion, this defendant moves for an order of the Court striking each and every portion of said com-

plaint, including Exhibit D attached thereto, which refers to interest or the alleged liability of this defendant to the plaintiffs for interest.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN &  
THOMPSON,  
Attorneys for defendant C. E.  
Bonnell.

Copy received this 20th day of July, 1948.

/s/ J. CHARLES DENNIS,  
U. S. Attorney.

[Endorsed]: Filed July 20, 1948.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Comes now C. E. Bonnell, d/b/a The Bonnell Construction Company, one of the defendants herein, and moves to dismiss this action for the reason and upon the ground that the complaint fails to state a claim against this defendant upon which relief can be granted.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN &  
THOMPSON,  
Attorneys for defendant C. E.  
Bonnell.

Copy received this 20th day of July, 1948.

/s/ J. CHARLES DENNIS,  
U. S. Attorney.

[Endorsed]: Filed July 20, 1948.



[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now Roy T. Earley, d.b.a The Roy T. Earley Company, one of the defendants herein, and moves to dismiss this action for the reason and upon the ground that the complaint fails to state a claim against this defendant upon which relief can be granted.

/s/ L. L. THOMPSON,

HENDERSON, CARNAHAN &  
THOMPSON,

Attorneys for defendant Roy  
T. Earley.

Copy received this 20th day of July, 1948.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

[Endorsed]: Filed July 20, 1948.

---

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now Roy T. Earley, d/b/a The Roy T. Earley Company, one of the defendants herein, and moves to strike the complaint herein for the reason and upon the ground that there is sought to be set out in said complaint separate alleged causes of action against the defendants founded upon a separate transaction and occurrence which are not stated in separate counts as required by Sub-division (b)

Rule 10 of the Rules of Practice prescribed for the District Courts of the United States.

In the alternative, and in the event that the foregoing Motion be denied and without waiving said Motion, this defendant moves for an order of the Court striking each and every portion of said complaint, including Exhibit D attached thereto, which refers to interest or the alleged liability of this defendant to the plaintiffs for interest.

/s/ L. L. THOMPSON,

HENDERSON, CARNAHAN &  
THOMPSON,

Attorneys for defendant Roy  
T. Earley.

Copy received this 7/20/48.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

[Endorsed]: Filed July 20, 1948.

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[Title of District Court and Cause.]

### ORDER

This matter coming on regularly for hearing on January 24, 1949, pursuant to notice, upon the separate motions of the defendants herein to strike the complaint upon the ground that alleged separate causes of action are not set forth in separate counts, and in the alternative, that all reference to liability for interest in the complaint and Exhibit

“D” attached thereto be stricken, and upon the separate motions of the defendants to dismiss the complaint on the ground that it fails to state a claim against the respective defendants upon which relief can be granted, and the defendants having served and filed their memorandum on Motion to Dismiss, Motion to Separately State, or in the Alternative to Strike, and the plaintiff having served and filed its memorandum and Reply Brief upon the points of law specified in defendant’s memorandum and motions, and the court having heard the arguments of L. L. Thompson, of counsel for defendants, in support of said motions, except the motion to separately state which counsel assertedly abandoned on behalf of defendants, and having heard the argument of Guy A. B. Dovell, Assistant United States Attorney, of counsel for plaintiffs, in opposition thereto, and the court having taken under advisement the question of constitutionality of the Renegotiation Act in its application to a Government executed contract as outlined in defendants’ memorandum and argument, and having on January 25, 1949, in open court rendered its decision overruling and denying said motions with exceptions allowed defendants, it is now, therefore,

Ordered that the defendants’ said motions to strike the complaint, or in the alternative to strike all reference to liability for interest be and the same are hereby overruled, and that defendants’ motions to dismiss the complaint be and the same are hereby in all respects denied.

To each of which rulings, except as to the motions to separately state, the defendants, by counsel, except and their exceptions are hereby allowed.

It is the further Order of the court that the defendants shall have thirty (30) days from the date of entry of this order within which to file and serve their answer to the complaint herein.

Done in Open Court this 27th day of Jan., 1949.

/s/ CHARLES H. LEAVEY,  
U. S. District Judge.

Approved as to Form:

/s/ L. L. THOMPSON,  
Of Counsel for Defendants.

Presented by:

/s/ GUY A. B. DOVELL,  
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 27, 1949.

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[Title of District Court and Cause.]

### ANSWER

Come now the defendants and for answer to the complaint of the plaintiffs admit, deny and allege as follows:

#### I.

Defendants admit the allegations contained in paragraphs I and II of the complaint.

II.

Defendants admit the allegations contained in paragraph III of the complaint except that they deny:

1. That there was any agreement that said job would be performed under the trade name of Bonnell Construction Company.

2. That there was ever any agreement between these defendants by which the defendant Bonnell constituted the defendant Earley as his agent for all purposes of said War Department contract, or for any purpose.

III.

Answering the allegations contained in paragraph IV of the complaint, these defendants deny each and every allegation therein contained, except that they admit that the RFC Price Adjustment Board mailed to the defendant Bonnell a certain document which, in words and figures, was the same as Exhibit "B" attached to the complaint.

IV.

Answering the allegations contained in paragraph V of the complaint, these defendants admit that a letter which, in words and figures, was the same as Exhibit "C" attached to the complaint, was mailed to and received by the defendant C. E. Bonnell.

V.

Answering the allegations contained in paragraph VI of the complaint, these defendants admit that

in the event it should be adjudicated that the profits received by them under said contract were excessive in the sum of \$55,000.00, then there should be credited thereon a tax credit of \$35,034.59 as alleged in said paragraph.

## VI.

Answering the allegations contained in paragraph VII of said complaint, these defendants deny each and every allegation therein contained, except that they admit:

1. That they have refused and still refuse to voluntarily pay to the plaintiffs any sums of money claimed by the plaintiffs to be due under said alleged renegotiation.

2. That they admit that the plaintiffs have heretofore withheld from the defendant Bonnell the sum of \$7,076.45, which represents moneys they would otherwise have paid to Bonnell upon other transactions between Bonnell and the plaintiffs.

The defendants further allege that in addition to the sum of \$7,076.45, the plaintiffs on April 6, 1948 withheld and wrongfully applied upon said renegotiation claim the sum of \$307.73, which sum represented an income tax refund allowed to the defendant Bonnell by the Bureau of Internal Revenue of the United States. Defendants also deny that there is due, owing and unpaid from these defendants to the plaintiffs the sum of \$13,341.59, with interest, or any sum whatsoever.

For a separate partial answer and defense to said complaint, insofar as the plaintiffs' claim for in-



terest is concerned, and without admitting that defendants are liable to the plaintiffs herein any sum, defendants allege:

### I.

The contract entered into between defendant Bonnell and the plaintiffs, referred to in the complaint, was entered into shortly after the beginning of World War No. 2 and was for the immediate construction of certain military barracks in Bremerton. The defendant Bonnell made a lump sum contract with the plaintiffs for the construction of said barracks and secured the performance thereof by a security bond. Said contract provided that the work must be completed within sixty days and involved much hazard and risk of loss arising out of the then uncertainty with respect to securing materials and adequate labor. Defendant Earley had been for many years engaged in the contracting business and during the year 1942 he took contracts from the plaintiffs necessitated by the war in a substantial sum. Earley was renegotiated by the plaintiffs for all of his said contracts which were subject to renegotiation in said years and it was found and determined that he made no excessive profits and he was not required to repay to the Government any sum whatsoever upon said contracts. During said time it was almost the universal practice of the Government to renegotiate war contracts on an annual basis and this practice was made obligatory by Congress in the amendment made by Congress to the original Act in October, 1943. The

effect of the action taken by the plaintiffs in this case is to apply to the defendant Earley an inequitable and unjust rule not followed in the renegotiation of other war contracts on account of the fortuitous event that in this particular instance the defendant Earley had a joint venture arrangement with the defendant Bonnell.

## II.

During said time also the ordinary commercial rate of interest in the community ranged from  $3\frac{1}{2}\%$  to  $4\frac{1}{2}\%$ , even upon open and commercial unsecured loans. During the same period the Government paid interest upon loans made to it ranging from less than 1% on short-term loans to a maximum of 2.9% on Treasury Bond loans. The figure of 6% interest demanded by the Government was and is excessive and exorbitant, since during said period there were few, if any, loans of a legitimate business nature made at such an interest rate. In the case of *Arkansas Valley Railway vs. U. S.*, 68 Fed. Sup. 727, the Government contended in the Court of Claims of the United States in a suit brought against it on a claim for which the statute provided no rate of interest, that it ought not to exceed 4%, which rate of interest was fixed by the Court of Claims. Defendants allege that the Government, by reason of the position taken by it in said case before the Court of Claims, has established a maximum interest rate which should be charged, and that the charging of interest in excess of 4% would be in-



equitable and unjust and contrary to the position taken by the Government with respect to claims against it.

### III.

On June 20, 1946 the attorneys for these defendants received a letter from Guy A. B. Dovell, Assistant United States Attorney in Tacoma, in which said attorneys were advised that the office of the District Attorney was "in receipt of instructions from the Attorney General of the United States to undertake settlement of the above matter." The matter referred to in the letter was the claim of the Government against these defendants herein involved. Thereafter, there was some discussion between defendants' attorneys and Mr. Dovell which culminated in the submission by defendants' counsel to Mr. Dovell on October 18, 1946 of an offer of compromise and settlement. Defendants allege on information and belief that said offer of compromise so made was forwarded by the office of the District Attorney to the Attorney General of the United States. Thereafter, the office of the Attorney General of the United States advised the District Attorney by a written communication as follows:

"In view of the circumstances of this case, it is suggested that you have the contractor's attorneys to make a formal written offer of compromise settlement addressed to The Attorney General. The offer should cover in full detail exactly what the contractor proposes to do. A copy of such proposal can be lodged

with you at the same time the original is mailed to the Department.”

Thereafter, and pursuant to said suggestion so made, these defendants on December 20, 1946 submitted to the Attorney General of the United States an offer of compromise and settlement. On January 13, 1947 one John F. Sonnett, Assistant Attorney General of the United States, and apparently in charge of this claim, sent to defendants’ attorneys a letter which, omitting salutation and signature, read as follows:

“This is to advise you that your letter of December 20, 1946 is being considered as a formal offer of compromise settlement in this case.

“As is customary in all compromise settlement cases the views of the Government agency in interest and the views of the United States Attorney handling the case will be sought before giving the offer final consideration in this Department. We are now awaiting the views of the United States Attorney at Seattle, Washington. As soon as we hear from him you will be advised of the Department’s final position on the matter.”

Defendants do not know what, if any, views were expressed by the United States Attorney at Seattle, Washington concerning defendants’ offer of compromise, but allege on information and belief that it was, to some extent at least, favorable. At this time several cases were pending in the Federal

Courts of the United States involving the validity of the Renegotiation Act. Defendants allege, on information and belief, that no action was taken on defendants' offer of compromise, pending the determination of certain cases then pending in the Federal Courts. In any event, Mr. Sonnett did not advise defendants' counsel at any time or place "of the Department's final position on the matter," as promised in his letter of January 13, 1947. Neither defendants or their counsel have ever received any direct advice from the office of the Attorney General with respect to the position of that office from that date. However, on or about the 1st day of June, 1948 defendants' attorneys were advised by Mr. Dovell that the office of the Attorney General of the United States had finally decided to reject the previous compromise proposal made by the defendants on December 20, 1946. The delay in the final determination of this matter, therefore, was in part, at least, caused by the action of the office of the Attorney General of the United States in holding under consideration defendants' offer of compromise for a period of almost one and one-half years, and that it is therefore inequitable to charge and assess interest at the rate of 6% per annum against the defendants during that period, since no complaint had been filed by the plaintiffs and the question of the liability of the defendants, in view of the fact that the contract had been entered into before the date of the passage of the Renegotiation Act, was at least doubtful.

Wherefore, defendants pray judgment as follows:

1. That this action be dismissed with prejudice.

2. In the alternative, and in the event that the court shall refuse to dismiss the action and shall allow a recovery of the face of the plaintiffs' claim, then that the defendants be permitted to introduce evidence concerning the interest rate to be applied.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN &  
THOMPSON,  
Attorneys for Defendants.

Received copy Feb. 10, 1949.

/s/ GUY A. B. DOVELL,  
Assistant U. S. Attorney.

[Endorsed]: Filed Feb. 10, 1949.

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[Title of District Court and Cause.]

### MOTION FOR JUDGMENT ON PLEADINGS

Comes now the plaintiffs in the above-entitled action by their attorneys, J. Charles Dennis, United States Attorney, and Guy A. B. Dovell, Assistant United States Attorney, and respectfully move the court to enter judgment on the pleadings filed in this case, in favor of the plaintiffs and against the defendants, and assign therefor the following reasons and grounds.

I.

That on or about April 24, 1942 defendant C. E. Bonnell, d/b/a The Bonnell Construction Company entered into a war contract with plaintiffs, which was subject to renegotiation, and thereafter in order to perform said contract entered into a joint adventure agreement with defendant Roy T. Earley, d/b/a The Roy T. Earley Company, whereby it was agreed they should share in the performance of said contract and equally in the profits therefrom, and as such they performed said contract.

II.

That the RFC Price Adjustment Board, in compliance with law and pursuant to duly delegated authority has determined that \$55,000.00 of the profits realized by the defendants during the fiscal year ending December 31, 1942, under said contract, are excessive, and for which they are liable to plaintiffs.

III.

That plaintiffs are suing to recover the sum of \$13,341.59, being the net amount of said obligation remaining after the application in reduction of said obligation of tax credits in the sum of \$35,034.59, and the sum of \$7,076.45 out of funds which have at various times come due to the defendants, and have been applied either to payment of interest which theretofore had accrued or to reduction of principal obligation.

## IV.

That the correctness of the amount claimed as excessive and the defenses pertaining thereto are in the exclusive jurisdiction of the Tax Court of the United States; and the issues of law entertainable in this court and heretofore raised by the defendants pursuant to their motions herein filed, have been determined by this court in favor of the plaintiffs.

## V.

That defendants are indebted to plaintiffs in the sum of \$13,341.59, and interest from September 29, 1945, as pleaded, at such rate of interest as the court may determine to be proper.

## VI.

That Rule 12(c) of the Federal Rules of Civil Procedure, as amended, with reference to motion for judgment on the pleadings, provides:

“After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.”



VII.

That in support of the position that the matter of interest and the rate thereof applicable to the obligation herein involved is a question of law, the plaintiffs herewith submit their memorandum.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ GUY A. B. DOVELL,

Assistant U. S. Attorney.

Received copy of above Motion this 22nd day of April, 1949.

/s/ L. L. THOMPSON,

Attorney for Defendants.

[Endorsed]: April 22, 1949.

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[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

25th day of January, 1949

Before: The Honorable Charles H. Leavy, United States District Judge, at Tacoma, Washington.

APPEARANCES:

GUY A. B. DOVELL,

Assistant United States Attorney, appeared for the Plaintiffs; and

L. L. THOMPSON,

of Henderson, Carnahan and Thompson, 1410-24 Puget Sound Bank Building, Tacoma, Washington, appeared for the Defendants.

The Court: Now we will refer to Docket 1146, United States, et al, vs. C. E. Bonnell, doing business as Bonnell Construction, et al, for final disposition.

I have asked counsel back into Court again in connection with this matter because since it was presented by oral argument yesterday I have checked the authorities that are relied upon and gone into the matter much more fully and unless there be a stipulation—I would want that to be formal—I do not feel that I could make a disposition of the case on its merits.

I think there ought to be, for the purpose of a complete record, an Answer filed herein, and that is the matter that I want to take up, Mr. Thompson, if you are agreeable to that.

Mr. Thompson: No; I am not consenting that the Court make a disposition on the merits because I take it that, if we are going to appeal it, I don't want to do it on this record. I would want to file an Answer.

The Court: You couldn't have an order denying your motion to dismiss because it wouldn't be an appealable order.

Mr. Thompson: I won't stipulate.

The Court: I am not going to ask you to.

There are two or three motions here. There is a motion to state separately and a motion to dismiss.

Mr. Dovell: The motion, I think, is to state separately and then also in the alternative to strike the interest and then there is another motion to dismiss,



as I recall. But, the motion to state separately was abandoned.

The Court: Yes, but in order to complete the record the Court will overrule that motion and allow an exception. And the motion to strike interest will likewise be overruled. And, the motion to dismiss will have to be denied. And an exception will be allowed to each ruling and a formal order made and the Defendant will be allowed such reasonable time as is needed to file an Answer.

Mr. Thompson: I would like more than ten days. I would like at least thirty days, because my client went back to Boston.

The Court: You want additional time, Mr. Thompson?

Mr. Thompson: I would want additional time. I think the *modus operandi* would be to put an Answer in if I want to appeal. I wouldn't want to do that on just the Government's bill of complaint.

The Court: How much time do you want?

Mr. Thompson: I would like to make it thirty days.

The Court: Do you have any objection?

Mr. Dovell: No, your Honor, but there is one point that I would like to have covered and that is counsel's oral motion to dismiss Defendant Earley that was made yesterday.

Mr. Thompson: That wasn't oral. I interposed——

The Court: They are separate motions.

Mr. Dovell: Yes, your Honor.

The Court: The motion will be denied and the Defendant's will have thirty days in which to plead further in this matter. You may prepare a formal order, Mr. Thompson, and an exception will be allowed the Defendants.

Mr. Dovell: Yes, your Honor.

The Court: Now, if there is nothing further, Court will be adjourned.

(Whereupon, at 2:50 o'clock, p.m., January 25, 1949, the hearing in this cause was adjourned.)

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### CERTIFICATE

I, Earl V. Halvorson, official court reporter for the above-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed April 29, 1949.

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[Title of District Court and Cause.]

### TRANSCRIPT OF COURT'S ORAL DECISION

Given by the Honorable Charles H. Leavy, United States District Judge, in the above-entitled and numbered cause, in the above-entitled court, on the 2nd day of May, 1949, at Tacoma, Washington.

Argument by respective counsel having been made, the following proceedings were had:

The Court: Mr. Dovell, I am satisfied that interest should be allowed here on the amount of the claim less the amount you conceded that should be deducted, but what I would like to have you talk on is what the rate should be.

(Whereupon, further argument was made by counsel for Plaintiff.)

The Court: It is your contention that it should be six per cent and no less than that?

Mr. Dovell: It ought to be six per cent but my contention is that it is within the discretion of the Court.

The Court: Motion by the Plaintiff, in the form of a motion for a judgment on the pleadings, is granted less the amount admitted to be a credit to the Defendant.

That leaves us only the question of what, if any, interest should be allowed on that sum. I agree with counsel on both sides that the matter of determining interest is one that is within the discretion of the Court since the Act is silent in regard to interest.

If it be within the discretion of the Court, then it follows on the equitable side of the law to determine what would be equitable and who is the more to blame if this claim hasn't heretofore been cleared. It is almost four years now, I believe. While the amount is not an unusually large one, nevertheless the interest item becomes quite large, possibly it could be about twenty per cent of the

total amount. The Government agrees it is at least as culpable as the Defendant in this case.

Mr. Dovell: I might say, your Honor, that it never discouraged the Defendant from making further offers.

Mr. Thompson: It is not the District Attorney. I want to absolve the District Attorney of anything.

The Court: I don't think you can blame the District Attorney.

Mr. Thompson: No.

The Court: But the authorities in Washington ought to give precedence to those cases that have reached the Courts and give priority to them so that they can make a disposition of them, even though I appreciate they have a tremendous responsibility. The Defendant at the outset would have had to pay about four per cent for money borrowed; the Government had it gotten their money at the outset would have saved themselves paying 2.9 per cent on the sum. Consequently, I think the interest should be fixed somewhere between those figures and I shall find that the interest in this particular case, under the facts as admitted by the oral arguments and by the pleadings, should be at the rate of three (3) per cent instead of six (6); and you may prepare a judgment and make a disposition.

Mr. Dovell: Exception, your Honor.

The Court: And you will be allowed an exception if you desire one.

Now, if there is nothing further, Court will be adjourned.

(Whereupon, further hearing in this cause was concluded.)

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### CERTIFICATE

I, Earl V. Halvorson, official court reporter for the within-described court, hereby certify that the foregoing is a true and complete transcript of the matters therein set out.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed May 17, 1949.

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United States District Court, Western District of  
Washington, Southern Division  
No. 1146

UNITED STATES OF AMERICA, et al,  
Plaintiffs,

vs.

C. E. BONNELL, d/b/a THE BONNEL CON-  
STRUCTION COMPANY, and ROY T.  
EARLEY, d/b/a THE ROY T. EARLEY  
COMPANY, Joint Adventurers under the trade  
name "BONNELL CONSTRUCTION COM-  
PANY OF BREMERTON,"

Defendants.

### JUDGMENT

This cause coming on to be heard on May 2, 1949, on plaintiff's motion for judgment on the pleadings, the plaintiff appearing by J. Charles Dennis, United

States Attorney and Guy A. B. Dovell, Assistant United States Attorney, and defendants appearing by L. L. Thompson of counsel, Henderson, Carnahan & Thompson, attorneys for defendants, and it appearing to the court that said motion is based upon the grounds that the defendant, C. E. Bonnell, d/b/a The Bonnell Construction Company, on or about April 24, 1942, entered into a war contract with plaintiffs, which was subject to renegotiation, and thereafter in order to perform said contract entered into joint adventure agreement with defendant Roy T. Earley, d/b/a The Roy T. Earley Company, whereby it was agreed between them they should share in the performance of said contract, and equally in the profits therefrom and as such they performed said contract; that the R. F. C. Price Adjustment Board, in compliance with law, and pursuant to duly delegated authority has determined that \$55,000.00 of the profits realized by the defendants during the fiscal year ending December 31, 1942, under said contract are excessive, and for which the defendants are liable to the plaintiffs, and on March 17, 1945, made demand for payment; that the plaintiffs are suing to recover the sum of \$13,341.59 with interest at the rate of 6% per annum from September 29, 1945, as pleaded, being the net amount of said obligation resulting from the application in reduction thereof of tax credits in the sum of \$35,034.59, and the sum of \$7,076.45 out of funds which have at various times come due to the defendants and have been applied to the pay-



ment of accrued interest and the remainder on the principal, as shown by Exhibit "D" to the complaint; that the issues of law raised by defendant's Motions to Strike the claim of interest liability from the complaint, and motions to dismiss the action involving the constitutionality of the Renegotiation Act in its application to the contract herein made with the government previous to the passage of the Act, have heretofore been determined by the court; and it further appearing to the court that the defendants by their failure to make application to the Tax Court cannot now question the correctness of the amount claimed as excessive and the defenses pertaining thereto, including the defense set up in the answer that defendant Earley was unjustly renegotiated on his joint-adventure contract separate from all his other contracts for that year, are not now available to them or either of them; and the court having heard the arguments of counsel upon the question of liability for interest on the contract entered into prior to the Renegotiation Act and upon the question of rate of interest applicable to the renegotiated claim, and it appearing to the court that the plaintiffs are entitled to judgment on the pleadings on the admitted facts therein appearing and as a matter of law, and that interest at the rate of 3% per annum should be allowed on said claim, and that the payments in the sum of \$7,076.45 heretofore applied to interest and principal should be adjusted according to said rate, and a further tax refund of \$307.73, should be allowed



as of April 6, 1948, and that judgment should be rendered the plaintiffs for the principal balance in the sum of \$12,806.54, and for the amount of interest accrued from date of last credit of interest, September 29, 1945, to the date of said principal credit, April 6, 1948, in the sum of \$991.66, and together with interest thereafter at said rate on the sum of \$12,806.54 to June 1, 1949, the date of entry hereof, in the sum of \$442.09, amounting to the total sum, principal and interest of \$14,240.29, and for the plaintiff's costs herein incurred; and the court being fully advised in the premises; now, therefore, it is hereby,

Ordered, Adjudged and Decreed that the motion of the plaintiffs for judgment upon the pleadings be and the same hereby, in conformity with the law and admitted facts, is granted; and that it is, therefore,

Ordered, Adjudged and Decreed, that the plaintiff, United States of America, do have and recover of the defendants, C. E. Bonnell and Roy T. Earley, and each of them, judgment in the sum of \$14,240.29, and for plaintiff's costs, as taxed herein, to-wit, the sum of \$39.00.

Each of said parties, by counsel, has excepted to each and every adverse ruling of the court hereinabove set forth and said exception is hereby allowed.

Done In Open Court this 1st day of June, 1949.

/s/ CHARLES H. LEAVY,

U. S. District Judge.

Presented by:

/s/ GUY A. B. DOVELL,

Assistant U. S. Attorney.

Receipt of copy of above proposed form of judgment acknowledged this 9th day of May, 1949.

/s/ L. L. THOMPSON,

Attorney for Defendants.

Notice of entry waived.

/s/ L. L. THOMPSON.

## EXHIBIT "D" TO COMPLAINT

Adjusted pursuant to court's ruling of 3% interest in lieu of 6% per annum.

Recoveries Department	Effective Date	Amount	Interest	Application Principal
War .....	7/ 4/45	\$3,064.34	\$116.51	\$ 2,947.83
War .....	8/ 9/45	3,134.86	50.40	3,084.46
War .....	9/29/45	877.25	58.40	818.85

(Tax Refund \$307.73 as of 4/6/48—See

Answer not included in above application.)

Interest Computations:

Balance		(3%) Accrual	Recovery	Interest Balance
\$19,965.41	4/24/45 to 7/24/45	\$ 116.51	\$116.51	\$ —0—
17,017.58	7/ 4/45 to 8/ 9/45	50.40	50.40	—0—
13,933.12	8/ 9/45 to 9/29/45	58.40	58.40	—0—
13,114.12	9/29/45 to 4/ 6/48	991.66	.....	991.66
12,806.54	4/ 6/48 to 6/ 1/49	442.09	.....	442.09
Total Interest Balance.....				\$ 1,433.75
Forward Principal Balance.....				12,806.54
Total .....				\$14,240.29

[Endorsed] : Filed June 1, 1949.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from that part of the District Court's order set forth in the minutes of proceedings entered upon the court journal at the time of hearing plaintiff's motion for judgment on the pleadings on May 2, 1949 and from so much of the final judgment pursuant to said order entered in this action on June 1, 1949 as denies to the plaintiff from the defendants a recovery upon its claim in the full sum of \$13,341.59, as principal balance due, with interest thereon at the rate of 6% per annum from September 29, 1945, less a withheld tax refund of \$307.73 as deductible from the amount of said interest.

Dated this 27th day of June, 1949.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ GUY A. B. DOVELL,

Assistant U. S. Attorney,

Attorneys for Appellant.

Received copy of above Notice of Appeal this 27th day of June, 1949.

/s/ L. L. THOMPSON,

Attorney for Defendants.

Copy of the within Notice of Appeals mailed to Henderson, Carnahan & Thompson, attorneys for

defendants, Tacoma, Washington, this 27th day of June, 1949.

/s/ E. E. REDMAYNE,  
Deputy Clerk.

[Endorsed) Filed June 27, 1949.

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[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

To the Clerk of the above entitled court:

The plaintiff, United States of America, herewith designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint
2. Answer
3. Motion for Judgment on Pleadings
4. Clerk's Minute entry covering order of court  
May 2, 1949
5. Judgment entered June 1, 1949
6. Notice of Appeal
7. Statement of points and acceptance of service  
endorsed thereon.
8. This Designation and acceptance of service  
endorsed thereon.

Dated this 27th day of June, 1949.

/s/ J. CHARLES DENNIS,  
U. S. Attorney.

/s/ GUY A. B. DOVELL,  
Assistant U. S. Attorney.

Received a copy of the within designation this 27th day of June, 1949.

/s/ L. L. THOMPSON,  
Attorney for Defendants.

[Endorsed]: Filed June 27, 1949.

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

The following is a statement of points on which appellant intends to rely on appeal:

#### I.

That the court erred in determining that 3% per annum is a proper rate of interest to be allowed plaintiff on its claim involved in this action, instituted June 29, 1948, to collect excessive profits, less credits owed by defendants pursuant to unilateral determination, under the Renegotiation Act, that defendants realized excessive profits on a war contract during the fiscal year ending December 31, 1942.

#### II.

That the court erred in fixing the rate of interest to be allowed on plaintiff's claim herein on the basis of what rate of interest the government would have paid for the use of equivalent funds pending payment of said claim, as a proper measure of damages

suffered by the plaintiff because of defendant's failure to make payment.

III.

That appellant (plaintiff) is entitled to interest at the rate of 6% per annum upon the amount determined as excessive profits to be eliminated less tax credits and tax refund as set out in the pleadings herein, from and after the date fixed in the demand for payment.

IV.

That appellant (plaintiff) is entitled to recover judgment in the sum of \$13,341.59 principal balance due on its claim, plus interest thereon at the rate of 6% per annum from September 29, 1945, as prayed for in its complaint, less a withheld tax refund of \$307.73 of April 6, 1948, as deductible from the amount of said interest, making a total as of June 1, 1949 principal and interest in the sum of \$15,974.84.

Dated this 27th day of June, 1949.

/s/ J. CHARLES DENNIS,

U. S. Attorney.

/s/ GUY A. B. DOVELL,

Assistant U. S. Attorney.

Received a copy of the foregoing statement this 27th day of June, 1949.

/s/ L. L. THOMPSON,

Attorney for Defendants.

[Endorsed]: Filed June 27, 1949.

[Title of District Court and Cause.]

DEFENDANTS' DESIGNATION OF ADDI-  
TIONAL CONTENTS OF RECORD ON  
APPEAL

To the Clerk of the above entitled court:

The defendants herein herewith designate the following portions of the record and proceedings to be contained in the record on appeal in addition to those heretofore designated by the plaintiff.

1. Defendants' Motion to Dismiss the action.
2. Order of the Court denying said Motion.
3. This Designation and acceptance of service endorsed thereon.

Dated this 7th day of July, 1949.

/s/ L. L. THOMPSON,

Attorney for Defendants.

Received a copy of the within Designation this  
7th day of July, 1949.

/s/ J. CHARLES DENNIS,

/s/ GUY A. B. DOVELL,

Attorneys for Plaintiff.

[Endorsed]: Filed July 7, 1949.



[Title of District Court and Cause.]

STIPULATION DESIGNATING PARTS OF  
RECORD TO BE OMITTED FROM THE  
RECORD ON APPEAL

Pursuant to Rule 75(o) of the Federal Rules of Civil Procedure for the District Courts of the United States, and the provision for hearing of appeals on original papers by Rule 11 of the United States Circuit Court of Appeals for the Ninth Circuit, effective January 1, 1949, it is hereby,

Stipulated and Agreed and understood by and between J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Assistant United States Attorney, attorneys of record herein for plaintiffs, and L. L. Thompson of counsel for defendants, that all the original papers of record in the above entitled court and cause are to be transmitted by the clerk of the District Court to the United States Court of Appeals for the Ninth Circuit, with the exception of the following named, which the parties hereto by counsel, have agreed shall be omitted, to-wit:

Omissions from Record on Appeal

1. Summons
2. Plaintiff's Memorandum filed 1/14/49
3. Notice of Hearing of Motions filed January 14, 1949
4. Defendant's Memorandum filed January 21, 1949
5. Plaintiff's Reply Brief filed January 24, 1949
6. Plaintiff's Memorandum filed April 22, 1949

7. Notice of Hearing filed April 22, 1949
8. Defendant's Memorandum filed April 29, 1949
9. Cost Bill

Dated this 8th day of July, 1949.

/s/ J. CHARLES DENNIS,  
U. S. Attorney.

/s/ GUY A. B. DOVELL,  
Assistant U. S. Attorney.

/s/ L. L. THOMPSON,  
of Counsel for Defendants.

[Endorsed]: Filed July 8, 1949.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON  
APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause all of the original pleadings on file and of record in said cause in my office at Tacoma, Washington (except those omitted pursuant to stipulation of the parties), as set forth below:

1. Complaint (1)

2. Motion to Dismiss (3)
3. Motion to Strike (4)
4. Motion to Dismiss (5)
5. Motion to Strike (6)
6. Order (10)
7. Answer (11)
8. Motion for Judgment on Pleadings (12)
9. Reporter's Transcript of Proceedings (16)
10. Reporter's Transcript of Court's Oral Decision (17)
11. Judgment (18)
12. Notice of Appeal (20)
13. Plaintiff's Designation of Contents of Record on Appeal (21)
14. Statement of Points (22)
15. Defendants' Designation of Additional Contents of Record on Appeal (23)
16. Stipulation Designating Parts of Record to be Omitted from the Record on Appeal (24)

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 22nd day of July, 1949.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ E. E. REDMAYNE,  
Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that C. E. Bonnell, doing business as Bonnell Construction Company, and Roy T. Earley, doing business as Roy T. Earley Company, defendants above named, do hereby appeal to the United States Court of Appeals of the Ninth Circuit from that certain final judgment entered by the above-entitled court on June 1, 1949, wherein and whereby judgment was entered in favor of the plaintiff United States of America, and against the defendants herein in the sum of \$14,-240.29 and plaintiffs costs.

Dated this 29th day of July, 1949.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN,  
THOMPSON,  
Attorneys for Defendants.

Copy received July 29, 1949.

/s/ HARRY SAGER,  
Asst. U. S. Atty.

Copy of the within Notice of Appeal delivered to the United States Attorney, Tacoma, Washington, this 29th day of July, 1949.

/s/ E. E. REDMAYNE,  
Deputy Clerk.

[Endorsed]: Filed July 29, 1949.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, C. E. Bonnell and Roy T. Earley, the defendants above named, as Principals, and the General Casualty Company of America, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto United States of America, and John D. Goodloe, Henry T. Bodman, Harvey J. Gunderson, Harry Hise and Henry A. Mulligan, Directors of the Reconstruction Finance Corporation, the plaintiffs above named in the just and full sum of Two Hundred and Fifty (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of July, 1949.

The Condition of This Obligation Is Such, That, Whereas, the above named plaintiff, United States of America, on the first day of June, A.D. 1949, in the above-entitled action and court, recovered judgment against the defendants above named for the sum of \$14,240.29.

And Whereas, the above-named principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the United States Circuit Court of Appeals for the Ninth Circuit.

Now Therefore, if the said Principals, C. E. Bonnell and Roy T. Earley, shall pay to United States of America, and John D. Goodloe, Henry T. Bodman, Harvey J. Gunderson, Harry Hise and Henry A. Mulligan, Directors of the Reconstruction Finance Corporation, the plaintiffs above named, all costs and damages that may be awarded against said defendants, if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award if the said judgment is modified, not exceeding the sum of \$250.00, then this obligation to be void, otherwise to remain in full force and effect.

[Seal]        /s/ C. E. BONNELL,

[Seal]        /s/ ROY T. EARLEY,

GENERAL CASUALTY COM-  
PANY OF AMERICA.

By /s/ A. B. COMFORT,  
Attorney in Fact.

Approved this ..... day of July, 1949.

.....,

District Judge.

[Endorsed]: Filed July 29, 1949.

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

The following is a statement of points on which the defendants, appellants on their appeal and ap-



pellees on the appeal of the plaintiff, intend to rely on their appeal:

### I.

That the Court erred in overruling their motion to dismiss and in failing to hold that the Renegotiation Act was in violation of the Constitution of the United States insofar as it attempted to make subject to renegotiation a contract entered into by these appellants with the United States prior to the taking effect of the Renegotiation Act.

### II.

That the Court erred in any event in allowing the plaintiff any interest whatsoever on its said claim for the reason that at the time the contract sought to be renegotiated was entered into there was no provision of law which authorized any such renegotiation and the Renegotiation Act which was subsequently passed contained no provision for the payment of interest. In other words, the point to be relied on is that, assuming the general constitutionality of the Act and assuming that the Court could properly hold that as to contracts entered into after the taking effect of the Act the right to renegotiate upon the part of the Government would be considered a part of the contract and therefore would support a judgment for interest, even without such a provision in the Statute, but that nevertheless this would not support a judgment for interest on a contract made previous to the taking effect of the Act in the absence of Statute.



## III.

That the judgment should be reversed and the action ordered dismissed, or, in the alternative and in any event, that the judgment should be vacated and no judgment for interest should be added.

Dated this 29th day of July, 1949.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN,  
THOMPSON,  
Attorneys for Defendants.

Received copy of the within Statement of Points this 29th day of July, 1949.

/s/ J. CHARLES DENNIS,  
U. S. Atty.  
/s/ HARRY SAGER,  
Attorneys for Defendants.

[Endorsed]: Filed July 29, 1949.

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[Title of District Court and Cause.]

## CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdiv. 1 of Rule 11, as amended, of the United States Court of Appeals' for the Ninth Circuit and Rule 70(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as Additional Record on Appeal in the above-

entitled cause additional original pleadings on file and of record in said cause in my office at Tacoma, Washington, as requested by Defendants' Designation of the Contents of Record on Appeal to wit:

1. Notice (of defendants') of Appeal (25)
2. Cost Bond on Appeal (26)
3. Statement of Points, etc. (27)
4. Defendants' Designation of Contents of Record on Appeal (28).

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 30th day of July, 1949.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ E. E. REDMAYNE,  
Deputy.

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[Endorsed]: No. 12306. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. C. E. Bonnell, Doing Business as The Bonnell Construction Company, and Roy T. Earley, Doing Business as The Roy T. Earley Company, Joint Adventurers Under the Trade Name of Bonnell Construction Company of Bremerton, Appellee, and C. E. Bonnell, d/b/a The Bonnell Construction Company, and Roy T. Earley, d/b/a Roy T. Earley Company, etc., Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District

Court for the Western District of Washington,  
Southern Division. Filed July 29, 1949.

PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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United States Court of Appeals for the  
Ninth Circuit  
No. 12306

UNITED STATES OF AMERICA,  
Appellant,  
vs.

C. E. BONNELL, d/b/a THE BONNELL CON-  
STRUCTION COMPANY, and ROY T.  
EARLEY, d/b/a THE ROY T. EARLEY  
COMPANY, Joint Adventurers Under the  
Trade Name "BONNELL CONSTRUCTION  
COMPANY OF BREMERTON,"  
Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD FOR  
PRINTING

Comes now appellant, United States of America,  
and pursuant to subdivision 6, Rule 19 of the Rules  
of the United States Court of Appeals for the Ninth  
Circuit, states that the following is a re-statement of  
the points upon which appellant intends to rely on  
appeal, to wit:

I.

That the District Court erred in determining that 3% per annum is a proper rate of interest to be allowed plaintiff (appellant) on its claim involved in this action, instituted June 29, 1948, to collect excessive profits, less credits, owed by defendants pursuant to unilateral determination, under the Renegotiation Act, that defendants realized excessive profits on a war contract during the fiscal year ending December 31, 1942.

II.

That the District Court erred in fixing the rate of interest to be allowed on plaintiff's (appellant) claim herein on the basis of what rate of interest the government would have paid for the use of equivalent funds pending payment of said claim, as a fair and just compensation for defendants' failure and refusal to make payment upon demand.

III.

That appellant is entitled to interest at the rate of 6% per annum upon the amount determined as excessive profits to be eliminated less tax credits and tax refund as set out in the pleadings contained in the record herein, from and after the date fixed in the demand for payment.

IV.

That appellant is entitled to recover judgment in the sum of \$13,341.59, as principal balance due on its claim, plus interest thereon at the rate of

6% per annum from September 29, 1945, as prayed for in its complaint, less a withheld tax refund of \$307.73 of April 6, 1948, as deductible from the amount of said interest, making a total as of June 1, 1949, the date of entry of judgment, in the sum of \$15,974.84 principal and interest at said rate.

With the foregoing statement, the appellant designates as necessary for the consideration of this appeal all that portion of the original papers of record in this cause heretofore transmitted by the clerk of the District Court to the United States Court of Appeals for the Ninth Circuit in this cause, pursuant to stipulation of parties covering omissions from record on appeal, and the contents of which transmitted portion are as follows:

1. Complaint
2. Motion to Dismiss (Bonnell's)
3. Motion to Strike (Bonnell's)
4. Motion to Dismiss (Earley's)
5. Motion to Strike (Earley's)
6. Order on Motions.
7. Answer.
8. Motion for Judgment on Pleadings
9. Transcript of Proceedings on 1/25/49.
10. Transcript of Proceedings on 5/2/49.
11. Judgment (with recalculation of Exhibit "D" to complaint to reflect court's decision).
12. Notice of Appeal (plaintiff's)
13. Plaintiff's Designation of Contents.
14. Plaintiff's Statement of Points.
15. Defendants' Designation of Additional Contents.

16. Stipulation of omissions from record on appeal.

Dated this 5th day of August, 1949.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Attorneys for Appellant.

Service of the foregoing, by receipt of true copy thereof, is hereby acknowledged this 5th day of August, 1949.

HENDERSON, CARNAHAN &  
THOMPSON,

[Endorsed]: Filed Aug. 8, 1949.

I.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS  
OF RECORD FOR PRINTING ON CROSS-  
APPEAL OF APPELLEES

Come now C. E. Bonnell and Roy T. Earley, appellees on the appeal of the United States of America, and appellants on their cross-appeal, and designate the following portions of the record to be printed in addition to the portions heretofore designated by the United States of America, to wit:

1. Notice of Appeal by Bonnell and Earley from Judgment.
2. Cost Bond filed by them on such appeal.

## 3. Statement of points involved.

Dated this 8th day of August, 1949.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN,  
THOMPSON,

Attorneys for C. E. Bonnell and Roy T. Earley,  
Appellees on Appeal of United States of Amer-  
ica and Appellants on Their Cross-Appeal.

Receipt acknowledged this 8th day of August,  
1949.

/s/ GUY A. B. DOVELL,  
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 10, 1949.



United States Court of Appeals for the  
Ninth Circuit

No. 12306

UNITED STATES OF AMERICA,  
Appellant and Appelle on Cross-Appeal,

vs.

C. E. BONNELL, d/b/a THE BONNELL CON-  
STRUCTION COMPANY, and ROY T. EAR-  
LEY, d/b/a THE ROY T. EARLEY COM-  
PANY, Joint Adventurers Under the Trade  
Name "BONNELL CONSTRUCTION COM-  
PANY OF BREMERTON,"

Appellees and Appellants on Cross-Appeal.

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANTS ON CROSS-  
APPEAL

Come now C. E. Bonnell and Roy T. Earley, ap-  
pellees on the appeal of the United States of Amer-  
ica, plaintiff in the court below and appellants on  
a separate or cross-appeal taken by them, and state  
that the points upon which they intend to rely in  
this court in this case are as follows:

1. That the court below erred in holding that the provisions of the Federal Renegotiation Act as amended (56 Statutes 245, Chapt. 247; 56 Statutes 982, Chapt. 247), insofar as they sought to authorize certain designated executive departments of the Government to renegotiate the amount due from

the Government under prime contracts entered into by contractors with the Government, prior to April 28, 1942, the date the Act took effect, was not in violation of the Constitution of the United States, particularly the Fifth Amendment thereto. Appellants will rely particularly on *Lynch vs. U. S.*, 292 U. S. 571, and *Perry vs. U. S.*, 294 U. S. 330 in support of this point.

2. In the alternative and in the event that this court will sustain the action of the court below with respect to the preceding point, then it will be asserted that the court below erred in entering judgment in favor of the appellee United States of America for interest on its claim prior to the date of judgment. This point will be based upon the proposition that since the Renegotiation Act contains no provision for the payment of interest, and since there is no general statute providing for interest, that the only cases in which interest can be allowed are cases involving contracts entered into after the taking effect of the Act. In those instances interest has been allowed upon the theory that the right to renegotiate became a part of the contract although not expressly referred to. Consequently, interest could be charged. It will be asserted that here, on account of the fact that the contract was entered into previous to the taking effect of the Act, that there was no right to collect interest upon the basis of either an express or an implied contract.

3. The general point will be made for the reasons heretofore stated: (a), that the court below

erred in entering judgment against these appellants in any amount, and (b), that in any event and in the alternative that it erred in entering judgment against these appellants for any interest upon the claim of the Government prior to the date of judgment.

Appellants further state that it is expected that a stipulation will be entered into between these appellants and counsel for the United States of America designating the portions of the record to be printed.

Dated this 2nd day of August, 1949.

/s/ L. L. THOMPSON,  
HENDERSON, CARNAHAN,  
THOMPSON,

Attorneys for C. E. Bonnell and Roy T. Earley,  
Appellees and Cross-Appellants.

Receipt of copy is herewith acknowledged this  
2nd day of Aug., 1949.

/s/ GUY A. B. DOVELL,  
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 4, 1949.

